

No. 21,977 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES F. ARMSTRONG,
Plaintiff-Appellant,

VS.

ALEC W. BROWN and LESTER J.
GENDRON, et al.,
Defendants-Appellees.

BRIEF OF APPELLEES

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FILED

SEP 12 1967

WM. B. LUCK, CLERK

SEP 20 1967

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JURISDICTIONAL STATEMENT

Appellant invokes Federal Jurisdiction under 28 U.S.C.A., Section 1343 (3-4), R.S. #1979 (1875) and 42 U.S.C.A., Section 1983 (1958). Nowhere in his complaint or brief is there any citation of authority for the proposition that a convicted felon has a "constitutional right" to file criminal complaints against a Justice Court Judge and District Attorney for alleged acts occurring after Appellant was incarcerated in the State Prison and his judgment of conviction had become final. (Appellant's Opening Brief, page 5, lines 9-13.)

Although couched in the language of due process and equal protection, there is no substantial factual issue alleged involving jurisdiction of the federal courts.

Appellees assert that the complaint is not a sufficient statement of facts to invoke federal jurisdiction.

STATEMENT OF THE CASE

For purposes of this brief, Appellees adopt the allegations of Appellant in his opening brief.

Appellees assert that stripped of the verbiage of deprivation of constitutional rights, due process and equal protection of the laws, Appellant's grievances are summarized as follows:

1. Appellees Alec Brown and Lester Gendron did not properly handle "criminal complaints" prepared by Appellant which accused certain judicial officers of alleged crimes.

SPECIFICATION OF ERRORS

Appellant contends it was error to dismiss his complaints and asserts numerous theories in support of his complaint as stating a claim under which relief might be granted.

ARGUMENT

Appellant was convicted in the California State Courts in 1953 and the judgment became final since no appeal was taken or perfected. (Appellant's Opening Brief, page 1, lines 22-23.)

Nine years later, while serving his sentence in the State prison, Appellant sought to have the Clerk of Madera County and the Deputy Clerk prosecuted for crimes alleged to have been committed by said Clerk and Deputy. Appellant is dissatisfied with the disposition of said matters and asserts that such disposition somehow deprived him of his constitutional rights. Appellees ask "What right does a prisoner have to compel criminal prosecutions of a County Clerk and a Deputy County Clerk because Appellant is displeased with their actions or inactions." As was pointed out in *Blackman v. Wagner*, 6 Cir., 235 F. 2d 11,

"The district court was not in error in dismissing the complaint. Certain of the defendants were immune from liability. *Kenny v. Fox*, 6 Cir., 232 F. 2d 288. As to others, the jury's verdict in the State criminal trial resolved any conceivable issues against Appellant. *Thompson v. Heither*, 6 Cir., 235 F. 2d 176. Rule 12, Fed. R. Civ. Procedure, 28 U.S.C.A."

Appellees assert that in addition to the rule of the *Blackman v. Wagner* (supra) rationale, the complaint does not state any claim upon which relief can be granted for the following reasons:

1. "No cause of action is stated under the Civil Rights Act where plaintiff was convicted of

armed robbery and it did not appear that he had applied to the State Supreme Court for leave to appeal from the judgment of conviction, since he had not exhausted his State court remedies." *Crawford v. Lydick*, D. C. Michigan, 179 F. Supp. 211, Affirmed 280 F. 2d 426.

2. "Judges are absolutely privileged as respects civil suits to recover damages for action taken by them in the exercise of their judicial functions and this is an absolute defense to actions brought under Civil Rights Act. *John v. Gibson*, C.A. Cal. 270 F. 2d, 36. This absolute defense is available in actions brought under the Civil Rights Act even if the confinement complained of may have been in violation of constitutional rights." *John v. Gibson*, supra; *Dunn v. Gazzola*, 1 Cir. 216 F. 2d 709; *Francis v. Crafts*, 1 Cir. 203 F. 2d 809, 811; *Gregoire v. Biddle*, 2 Cir. 177 F. 2d 579; *Tenny v. Brandhove*, 341 U. S. 367; *Francis v. Lyman*, 1 Cir. 216 F. 2d 583, 588; *Agnew v. Moody* (9 Cir. 1964) 330 F. 2d 868, Cert. den. 379 U. S. 867.

Appellees contend further that these numerous actions and appeals are without factual foundation to invoke federal jurisdiction and the consistent use of semantics in attempts to bring Appellant's claims under the Civil Rights Act are of such nature that the court can and should dismiss the appeal as frivolous, if the complaint was held to possibly state a claim under such Act. The authority to so dismiss is found in *Jiminez v. Barber*, 9 Cir., 252 F. 2d 550 set out as follows: "A court of appeals may in the exercise of its plenary power dismiss a civil appeal as

frivolous." Appellee adopts the language of the U.S. District Court which is set forth in its Memorandum and Order, as follows:

"Review of the entire file in this matter has convinced the court that this proceeding is utterly frivolous and malicious within the meaning of Title 28 U.S.C. Section 1915(d). Accordingly, the court adopts the suggestion made by the United States Court of Appeals for the Ninth Circuit in *Stiltner v. Rhay*, 322 F. 2d 314; and *Brown v. Brown*, 368 F. 2d 992, by dismissing Plaintiff's complaint (Compare: *Shobe v. California*, 362 F. 2d 545)."

CONCLUSION

The dismissal was proper and the appeal should be dismissed.

Dated, Madera, California,
August 24, 1967.

ROY E. WOLFE,
County Counsel of the County of Madera,
Attorney for Appellees.



I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the rules of the U. S. Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

ROY E. WOLFE
County Counsel

WITNESSE MY HAND AND SEAL OF OFFICE
this 11th day of March, 1964.

I hereby certify that the foregoing is a true and correct copy of the original as the same appears in the files of the County Counsel.

Witness my hand and seal of office this 11th day of March, 1964.

MARCEL L. FRANK

I certify that in connection with the
preparation of this bill I have examined
Rules 18, 19 and 20 of the rules of the U.
S. Court of Appeals for the Ninth Circuit,
and that in my opinion the foregoing bill
is in full compliance with those rules.

WILLIAM H. HARRIS
Clerk of Court

STATE OF CALIFORNIA)
COUNTY OF MADERA } SS.

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 209 West Yosemite Avenue, Madera, California. On the 11th day of September, 1967, I served the within Certificate on JAMES F. ARMSTRONG, Plaintiff-Appellant in said action, by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully pre-paid, in the United States post office mail box at Madera, California, addressed as follows:

Mr. James F. Armstrong
Box #A-25062
Represa, California.

I certify and declare, under penalty of perjury, that the foregoing is true and correct.

Executed on September 11, 1967, at Madera, California.

DOROTHY L. FARRELL

I am a citizen of the United States and a
resident of the County of Mariana; I am over the
age of eighteen years and not a party to the within
entitled action; my business address is 100 West
Yosemite Avenue, Madera, California. On the 11th
day of September, 1967, I received the within Certificate
on JAMES F. ARMSTRONG, Plaintiff, vs. Defendant, in said
action, by placing a true copy thereof, enclosed in
a sealed envelope with postage thereon fully pre-
paid, in the United States post office post paid
Madera, California, addressed as follows:

Mr. James F. Armstrong
Box 4A-75062
Madera, California.

I certify and declare, under penalty of perjury,
that the foregoing is true and correct.
Executed on September 11, 1967, at Madera,
California.

County of Mariana